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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

MARTIN WARREN,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT WITH ATTACHED APPENDIX

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QUESTIONS PRESENTED

I. Whether a "clearly erroneous" jury instruction — which authorized the jurors to determine the admissibility of exhibits that had already been entered into evidence — may be held to be harmless error under *Chapman v. California*, 386 U.S. 18 (1967), in the absence of overwhelming evidence of guilt?

II. Whether the Appellate Court construed a Connecticut sexual assault statute in an unforeseeable manner, and retroactively applied that construction to petitioner's conduct, thereby violating the petitioner's right to due process of law?

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v.

STATE OF CONNECTICUT,
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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

The petitioner, Martin Warren, respectfully prays that a writ of certiorari issue to review the judgments and opinion of the Appellate Court of the State of Connecticut, rendered on June 14, 1988 and July 13, 1988.

OPINIONS BELOW

The opinion of the Appellate Court of Connecticut on petitioner's direct appeal is officially reported at 14 Conn. App. 688. The opinion is unofficially reported at 544 A.2d 209, and is reprinted in the Appendix to this petition, at pp. 1A–17A.

The petitioner's motion for reargument or reconsideration was denied by the Appellate Court of Connecticut, without opinion, on July 13, 1988. A copy of that order is reproduced in the Appendix to this petition at p. 18A. Petitioner thereafter filed a petition to the Supreme Court of Connecticut, seeking certification for review of the Appellate Court judgment. The Supreme Court of Connecticut denied the petition for certification, without opinion, on September 20, 1988. *State v. Warren,* 209 Conn. 805, ____ A.2d ____. A copy of that order is reproduced in the Appendix at p. 19A.

JURISDICTION

The judgment of the Appellate Court of Connecticut was entered on June 14, 1988, and petitioner's timely motion for reargument or reconsideration was denied by the Appellate Court of Connecticut on July 13, 1988. Petitioner's timely petition for certification for review to the Supreme Court of Connecticut was denied on September 20, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3), on the grounds that the State of Connecticut has violated the petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: ". . .; nor shall any State deprive any person of life, liberty or property, without due process of law; . . .".

Conn. Gen. Stat. Sec. 53a-8. Criminal liability for acts of another. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Conn. Gen. Stat. Sec. 53a-48. Conspiracy. Renunciation. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Conn. Gen. Stat. Sec. 53a-65. Definitions. As used in this part, except section 53a-70b, the following terms have the following meanings:

* * *

(2) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body. Its meaning is limited to persons not married to each other.

* * *

(7) "Use of force" means: (A) Use of a dangerous instrument; or (B) use of actual physical force or violence or superior physical strength against the victim.

Conn. Gen. Stat. Sec. 53a-70. Sexual assault in the first degree: Class B felony: One year not suspendable. (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person.

(b) Sexual assault in the first degree is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court.

STATEMENT OF THE CASE

After a trial to a state jury in June and July of 1985, petitioner Martin Warren was convicted of sexual assault in the first degree (Conn. Gen. Stat. Section 53a-70(a)), and conspiracy to commit sexual assault in the first degree (Gen. Stat. Sections 53a-48(a) and 53a-70(a)). As a result of those convictions, petitioner was sentenced on August 23, 1985 to concurrent terms of imprisonment for eight years, execution suspended after four years, and two years probation.

The petitioner appealed, and on June 14, 1988, the Appellate Court of Connecticut affirmed both convictions. *State v. Warren, supra.* The petitioner's motion for reargument or reconsideration was denied by the Appellate Court on July 13, 1988, and petitioner's petition for certification for review was denied by the Supreme Court of Connecticut on September 20, 1988. *State v. Warren,* 209 Conn. 805, ____ A.2d ____.

In this petition, petitioner seeks review of two questions:

1. Whether a "clearly erroneous" jury instruction — which authorized the jurors to determine the admissibility of exhibits that had already been entered into evidence — may be held to be harmless error under *Chapman v. California,* 386 U.S. 18 (1967), in the absence of overwhelming evidence of guilt?

2. Whether the Appellate Court construed a Connecticut sexual assault statute in an unforeseeable manner, and retroactively applied that construction to petitioner's conduct, thereby violating the petitioner's right to due process of law?

I. State Trial Proceedings

A. The State's Case

The petitioner's prosecution arose from an alleged gang rape incident which occurred at a social club in Naugatuck, Connecticut, in the early morning hours of June 2, 1984. The basic facts of the case were summarized in the Appellate Court's opinion, 14 Conn. App. at 689–90 (Appendix pp. 2A–3A):

> The jury could reasonably have found the following facts. On June 1, 1984, the complainant left her home at approximately 10:30 p.m. and went to Gig's, a nightclub and bar in Torrington. The complainant left Gig's at 1 a.m. on June 2, 1984. Sometime between the hours of 1 and 1:30 a.m., the complainant arrived at a bar in Waterbury called Toad's Place where she sat alone and had one or two beers. While at Toad's Place, the complainant was approached by a man she had met approximately one year earlier at a company outing. After a brief conversation, the complainant accompanied the man and one of his friends to a place in Naugatuck known as the Naugatuck Social Club.
>
> The three arrived at the Naugatuck Social Club (NSC), a boarded-up, two room clubhouse where members and their guests shot pool and drank beer, at approximately 3 a.m. When the complainant walked in, she noticed that there were approximately twenty-five people in the clubhouse and that all but one or two were men. The defendant, who was then and had been the president or chairman of the NSC since its inception in 1983, was present when the complainant entered the clubhouse.
>
> The complainant walked into the front room of the NSC. When she did, the men crowded around

her. One of the men handed her a beer. She took a sip and the beer was taken away from her. Some of the men then began grabbing the complainant and pinching her. The complainant climbed up on top of the bar and tried to push the men away. The men continued to grab her, and she began clawing anyone who tried to touch her.

The complainant grabbed her pocketbook and tried to leave, but a man the complainant later identified as the defendant blocked the door. While the other men crowded around her, the defendant said, "I'll be the doorman." The defendant then said he wanted to play pool. He kicked the complainant and threw her onto the pool table. The complainant rolled off the table and someone handed her a pool stick. The defendant then proceeded to take a shot on the pool table. After the complainant had taken a shot, someone took the pool stick away from her. Some of the men grabbed the complainant and carried her to the back room, threw her down on a couch and proceeded to gang rape her. One of the men who participated in the gang rape was the defendant.

The complainant was a thirty-one year old woman at the time of the incident. She was employed at a restaurant, but previously had been employed by the Kay Dance Agency as an exotic dancer. As such, she had performed in various Connecticut night clubs.[1] The complainant had been inside the Naugatuck Social Club once before, with a boyfriend, when she was an exotic dancer.

At trial, the primary disputed issue was the identification of petitioner as one of the assailants. The complainant

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[1] During a colloquy in the jury's absence, the State's Attorney represented, "as an officer of this court, the Kay Dancers is a front for the Helter Skelter Motorcycle Club which is very active in this city and in neighboring cities in the sale of drugs, prostitution." (T.8.9).

made an in-court identification of the petitioner as the man who had blocked the door, and who first sat on her chest while she was on the couch. According to the complainant, the petitioner sat on her chest and inserted his penis in her mouth, while other men assaulted her vaginally.[2] Subsequently, other men took turns sitting on her chest.

The complainant had never seen the petitioner prior to that night, and there was no evidence of pretrial identifications, either by photograph or corporeal viewing.[3] In addition, the complainant was the only witness who testified about the sexual assault.

One final identification fact — which has special relevance to one of the questions presented in this petition — is that the complainant described the petitioner as having worn a "*dungaree* [blue denim] *jacket*" at the time of the assault. (Emphasis added.)

The complainant could not be certain as to how many individuals had sexually assaulted her that night. When the incident ended, after daylight, she was treated at a hospital for a dislocated finger, and there was evidence that she had sustained several lumps on her head. The complainant refused to submit to a full "rape kit" examination. Visual examination revealed a bruise on the inside of her left thigh, but medical personnel could not determine when the bruise had been sustained. Aside from that bruise, all parts of the vaginal area were normal and intact; there was no evidence of vaginal tearing or bruising. No tests for seminal fluid were performed.

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[2] The complainant testified that various men inserted their fingers and penises in her vagina, and that an object which felt like a beer bottle was also inserted there.

[3] The complainant's in-court identification of the petitioner occurred about twelve months after the incident.

B. The Defense Case

The petitioner did not testify. Aside from attacking the credibility of the state's witnesses, the thrust of the defense case was aimed at establishing the complainant's misidentification of petitioner as one of the perpetrators of the assault. To that end, the defense presented the testimony of four witnesses to establish that the petitioner was *not* the man in the blue denim jacket. These witnesses testified that on the night of June 1-2, 1984, which was a cool and rainy night, petitioner was wearing a brown or black leather jacket, a "Harley Davidson" tee shirt, dungarees, black riding boots, and a cap. Petitioner's leather jacket was old and tarnished; he had been wearing it for years, and he wore it all the time. Moreover, the leather jacket was distinctive: there were identifiable pins or medals on the front of the jacket, and "Harley Davidson" "wings" on the back. Although the Harley Davidson motif is common, on petitioner's jacket the insignia was on the lower or bottom part of the jacket rather than on the top where it is usually worn. The defense witnesses identified Defendant's Exhibit 6 as *the leather jacket worn by the petitioner* on June 1-2, 1984. The witnesses also testified that they had never seen the defendant wear a blue denim jacket, either that night, or at any time.

During the state's case, the complainant was recalled as a court's witness, to allow the defense to question her about a prior rape incident. Upon examination by defense counsel, the complainant testified that about two years earlier, she had told more than one person that she had been raped, after *she* was "*told* that it had happened." (Emphasis added.) She did not remember who, or how many people, she had told. She never reported that earlier rape because she didn't know the identity of her attacker, and she did not ask the police to investigate. She testified that she was "supposedly unconscious" at the time of the earlier rape.

C. The Jury Instructions

1. Instruction on Evidentiary Exhibits

During the charge, the trial court gave the following instruction to the jury:

> Various objects have been entered into evidence as exhibits and they were entered as being connected with the commission of the crimes charged here. An object connected with the commission of a crime must be shown to be in substantially the same condition as when the crime was committed. *You must decide, under the same test of reasonable probability, whether the identification nature of the item is sufficient to warrant its reception in evidence.* You must consider the nature of the article. In this case there are *various items of clothing,* floor plan, couch, bottles and so forth. You must consider the circumstances surrounding its preservation and custody and the likelihood of intermeddlers tampering with it in making your determination. (Emphasis added.)

2. Instructions on Elements of Sexual Assault in the First Degree

In its instructions to the jury on the elements of sexual assault in the first degree (Conn. Gen. Stat. Section 53a-70(a)), the trial court stated, *inter alia:*

> The first element of this charge of sexual assault in the first degree requires proof beyond a reasonable doubt that there was *sexual intercourse with the complainant's body* in any of the ways mentioned above. *If you find that such intercourse took place, whether by the defendant or by someone else, then the requirement of this first element is met,* provided, however, that penetration is determined by you, the jury, to have occurred, whether with a penis or by a manipu-

lated object, where the sexual intercourse was vaginal, anal or fellatio. The penetration is sufficient to satisfy the requirement of this statute where there is entry, however slight, by penis or manipulated object. Also, as a part of this element of the charge, its meaning is limited to persons not married to each other. (Emphasis added.)

II. State Appellate Proceedings

A. Instruction on Evidentiary Exhibits

On direct appeal, petitioner claimed that the trial court's instruction on evidentiary exhibits violated his right to due process of law, his right of confrontation, and his right to present a defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution (as well as the corresponding provisions of the Connecticut Constitution). Specifically, petitioner argued that the instruction violated the respective functions of judge and jury because it effectively directed the jurors to pass on the *admissibility* (not just the weight) of full evidentiary exhibits. Stated another way, the instructions authorized the jurors to completely *disregard* or *ignore* evidentiary items or objects that they had a *duty* to consider.

Although trial counsel had not objected to the instructions, the Appellate Court found "that this claim implicates the defendant's fundamental constitutional right to a fair trial, and hence, we will review this claim [raised] for the first time on appeal." *State v. Warren, supra*, 700; at App. p. 13A.[4]

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[4] Review was granted under the authority of *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973), which permits appellate review of newly-raised claims "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial."

As for the merits, the Appellate Court stated "it is clear that the trial court made an initial determination of the admissibility of all the exhibits entered at trial," and thus, the Court concluded that the instruction in question was "clearly erroneous."[5] *State v. Warren, supra,* 700–701; at App. 13A–14A. However, the Appellate Court nevertheless held that the instructional error was harmless beyond a reasonable doubt. *Id.* 700–701; at App. pp. 14A–15A.

With regard to the harmfulness of the instruction, petitioner had argued on appeal that the instruction was manifestly harmful. For example, consistent with the instruction, the jurors could have decided that the defendant's leather jacket (Def. Ex. 6) — a highly material part of the defense case, relating to the issue of identification — did not meet the test of "reasonable probability . . . sufficient to warrant its reception in evidence."

As noted earlier, the thrust of the defense was misidentification, i.e., that the petitioner was present at the NSC but did not lead the assault. The complainant testified that petitioner was wearing a blue denim jacket on the night of the incident, and petitioner produced evidence that he was wearing a leather jacket with distinctive insignia. The leather jacket was *the* critical piece of defense evidence: If the jury believed that the defendant was wearing that jacket on the night of the offense, the jury reasonably could have concluded that the victim's identification of the defendant was erroneous. In fact, the leather jacket was so significant that twenty percent of the state's closing argument (five transcript pages out of twenty-five) was aimed at discrediting the "jacket"

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[5] En route to this conclusion, the Appellate Court acknowledged that the purpose of the rule requiring *judges — not juries* — to determine the admissibility of evidence, is to "ensure[s] that the jury will only consider that evidence that is properly before it and also, that the jury *will not disregard evidence it is bound to consider.*" (Emphasis added.) *Id.* 700. As a general proposition, any instruction giving jurors " ' ". . . a 'second bite at the apple [of admissibility] serves only to confuse, and achieves no useful purpose . . . ." ' " *Id.* 701.

defense. Thus, as petitioner argued below, the trial court's instruction authorized the jurors to disregard, ignore, or exclude from their consideration, a major and essential item of defense evidence, which was inextricably bound to the defense of misidentification.

Despite the foregoing arguments, the Appellate Court found the error to be harmless:

> We begin by noting that there were no questions raised at trial concerning the authenticity of the jacket the defendant entered into evidence. No objection was made to its admission into evidence. It is hard to believe that when no objection was made to its admission, the jury could conclude tht the "identification nature of the item [was not sufficient] to warrant its reception into evidence." We further note that the question in this case was not whether the jacket the defendant claimed to have worn existed. The question was whether he was wearing that jacket on the night in question, and whether the complainant misidentified him. The defendant had several witnesses who testified as to what he was wearing on the night in question, and the jury was bound to consider that evidence. Given these facts and the fact that the instruction worked to the defendant's benefit for the exhibits entered by the state, we find this instructional error to be harmless beyond a reasonable doubt.
>
> *State v. Warren, supra,* 702

B. Instructions on Sexual Assault

In the first count of the substituted information, the petitioner was charged as a *principal* perpetrator of the crime of sexual assault in the first degree. At trial, the state did not request any instruction on accessorial liability (Gen. Stat. Section 53a-8); and, as the Appellate Court expressly found, no

such instruction was given. *State v. Warren, supra,* 692 n.1. Accordingly, the petitioner's guilt rested, if at all, on the theory that he was a principal perpetrator of the offense charged.

In its instructions on the elements of sexual assault in the first degree, the trial court stated, *inter alia,* that the "first element of this charge . . . requires proof . . . that there was *sexual intercourse with the complainant's body. . . . If you find that such intercourse took place, whether by the defendant or by someone else, then the requirement of this first element is met . . . .*" (Emphasis added.)[6]

On appeal, petitioner claimed that "this instruction enlarged the crime of sexual assault beyond the terms of the statute, thereby depriving him of his right to notice of the charges against him and his right to due process of law." *Id.* 691. Although this claim had not been raised at the trial, the Appellate Court reviewed the claim "because it implicates the defendant's fundamental constitutional right to a fair trial." *Id.* 691. The Appellate Court then rejected the claim and held that "a person may be convicted of the crime of sexual assault in the first degree *as a principal even if he, himself, does not* engage in intercourse. . . ." (Emphasis added.) *Id.* 694.

To reach this conclusion, the Appellate Court relied on the language and legislative history of Conn. Gen. Stat. Section 53a-70. First, the Court noted that "[b]y its very terms, this statute imposes liability for sexual assault on any person who compels another person, by the use of force, to engage in sexual intercourse, *regardless of with whom the sexual act is performed.*" (Emphasis added.) *Id.* 693. The Court also found that "this construction [of the statute] is clear from its legislative history." *Id.*

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[6] There was evidence that the defendant engaged in an act of fellatio with the victim. However, there was also evidence that the defendant restrained the victim while other men sexually assaulted her. Thus, under the instruction given, the defendant's conviction may have been based upon an act(s) of intercourse engaged in by other men.

REASONS FOR GRANTING THE WRIT

I. WHETHER A "CLEARLY ERRONEOUS" JURY INSTRUCTION — WHICH AUTHORIZED THE JURORS TO DETERMINE THE ADMISSIBILITY OF EXHIBITS THAT HAD ALREADY BEEN ENTERED INTO EVIDENCE — MAY BE HELD TO BE HARMLESS ERROR UNDER *CHAPMAN V. CALIFORNIA*, 386 U.S. 18 (1967), IN THE ABSENCE OF OVERWHELMING EVIDENCE OF GUILT?

> • "The evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." R. Traynor, The Riddle of Harmless Error 80 (1970). "Indeed, an appellate court attempting to apply harmless-error analysis is faced with a formidable burden." *Delaware v. Van Arsdall*, 475 U.S. 673, 688, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1984) (Marshall, J., dissenting)

A writ of certiorari should be granted in this case because, as demonstrated below, the Appellate Court of Connecticut failed to conduct its harmless error inquiry according to federally-mandated harmless error standards. Accordingly, this case involves the improper *application*, by a state appellate court, of the federal harmless error test.

Petitioner's claim can be best demonstrated by first briefly reviewing this Court's harmless error precedents; and second, by discussing what the Appellate Court did — or failed to do — in its harmless error analysis.

In *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), this Court held that the harmlessness of federal constitutional errors must be judged by a federal

harmless error standard. The Court reaffirmed the *Fahy*[7] test, and specifically held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 386 U.S. 24. The Court also observed that "[t]here is little, if any difference between" the *Fahy* standard,and "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* 24.

Recent decisions of this Court make clear that the *Chapman* harmless error test applies to *instructional* (constitutional) error as well as non-instructional (constitutional) error. See, e.g., *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Pope v. Illinois*, 481 U.S. ____, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987); *Burger v. Kemp*, 483 U.S. ____, 107 S.Ct. 3114, 97 L.Ed.2d 638, 650 n.5. As noted in *Rose v. Clark, supra*, 583, the *Chapman* test, when applied to instructional error, asks whether " 'on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt.' " (quoting *United States v. Hasting*, 461 U.S. 499, 510, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983)).[8]

For present purposes, the most significant aspect of this Court's harmless error pronouncements, is the apparent requirement that the reviewing court assess, as part of the

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[7] In *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), a case involving a Fourth Amendment violation, this court utilized the following harmless error test: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the [illegal] evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86–87.

[8] In *Hasting, supra*, 510–11, which involved improper comment on a defendant's failure to testify, this Court stated, "[t]he question a reviewing court must ask is this: absent the [constitutional violation], is it clear beyond a reasonable doubt that the jury *would have* returned a verdict of guilty?" (Emphasis added.)

"whole record," the strength of the prosecution's case when undertaking harmless error analysis. See *United States v. Hasting, supra*, 512 (finding harmless error because the "defense efforts presented patently and totally inconsistent theories," and because of the "*overwhelming evidence of guilt* and the inconsistency of the scanty evidence tendered by the defendants . . ."') (Emphasis added.); *Francis v. Franklin, supra*, 325–26 (approving court of appeals' finding that error not harmless: " 'Because intent was plainly at issue in this case, and was not *overwhelmingly proved* by the evidence . . . we cannot find the error to be harmless.' ") (Emphasis added.) See also, *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) ("overwhelming" evidence of guilt and "cumulative" nature of the erroneously admitted evidence); *Milton v. Wainwright*, 407 U.S. 371, 373, 377, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) ("overwhelming" evidence of guilt, including three properly-admitted full confessions); *Schneble v. Florida*, 405 U.S. 427, 431, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) ("independent evidence of guilt [was] overwhelming"); *Brown v. United States*, 411 U.S. 223, 231, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) ("[t]he testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."); *Delaware v. Van Arsdall, supra* ("the overall strength of the prosecution's case" is one of a "host of factors" entering into the harmless inquiry).

The foregoing decisions strongly suggest — if they do not compel — the conclusion that overwhelming evidence of guilt is a *sine qua non* for a finding of harmless instructional error.[9] With this conclusion in mind, it is necessary to examine briefly what the Appellate Court did — and did not do — in reaching its harmless error conclusion.

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[9] At least in a case where, as here, the reviewing court does *not* seek to justify its harmless error determination by relying on other portions of the jury charge, cf., *State v. Martin*, 15 Conn. App. 58, 67–68, 544 A.2d 231 (1988) (single disputed instruction on credibility was harmless beyond a reasonable doubt in light of other instructions).

The Appellate Court did not cite *Chapman* in its opinion, but it did cite *State v. Coleman*, 14 Conn. App. 657, 544 A.2d 194, cert. denied, 208 Conn. 815, 546 A.2d 283 (1988), a decision released the same day as *State v. Warren*. In *Coleman*, the Appellate Court held, based on a review of this Court's precedents, that the *Chapman* test is the "proper harmless error standard applicable to federal constitutional errors — instructional and noninstructional alike. . . ." *Id.* 679, 681. The *Coleman* court then proceeded to hold that an erroneous instruction — which created a risk that the jury might not undertake a proper evaluation of the only evidence bearing directly on the issue of the defendant's identity — was harmless, because the erroneous instruction was "significantly mitigated by the court's other instructions, *and because* the evidence of *identity was overwhelming*." (Emphasis added.) *Id.* 683.

In *State v. Warren*, however, the Appellate Court's harmless error determination rested solely on three grounds:

(1) "[i]t is hard to believe that when no objection was made to its admission, the jury could conclude that the 'identification nature of the item [was not sufficient] to warrant its reception into evidence.' " (Bracketed material in original.) *Id.* 702.

(2) "The defendant had several witnesses who testified as to what he was wearing on the night in question, and the jury was bound to consider that evidence." *Id.*

(3) "the instruction worked to the defendant's benefit for the exhibits entered by the state . . ." *Id.*

There are, of course, relatively short responses to the three considerations advanced by the Appellate Court. First, with regard to item (1) above, analysis of jury instructional error "requires careful attention to the words actually spoken to the jury . . ., for whether a defendant has been accorded his constitutional rights depends upon the way in which a *reasonable* juror *could have interpreted the instruction*."

(Emphasis added.) *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Francis v. Franklin, supra*, 315. Moreover, "[t]he question . . . is not what the [state appellate court] declares the meaning of the charge to be, but rather what a reasonable juror *could have understood the charge as meaning*."[10] (Emphasis added.) *Id.* 315-16.

Second, with regard to item (2) above, although it is true that the jury was "bound" to consider the defense witnesses' *testimony* about what the defendant was wearing; *State v. Warren, supra*, 702; if it chose to disregard *the exhibit*, what weight would the testimony have? Third, the ultimate harmfulness of this instruction must be measured by its qualitative effect on the jury's fact-finding function; not simply by calculating which side had more exhibits.[11]

What the Appellate Court *failed* to do in *State v. Warren*, was to consider the strength of the prosecution's case, i.e., to ask whether there was overwhelming evidence of guilt on the disputed issue of identification. The evidence on this issue was *not* overwhelming, and the Appellate Court makes no suggestion that it was. Thus, in completely overlooking or ignoring the "overwhelming evidence" component of the *Chapman* test, the Appellate Court utilized a harmless error

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[10]"A crucial assumption underlying that system [of trial by jury] is that juries will follow the instructions given them by the trial judge." *Parker v. Randolph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979); *Francis v. Franklin, supra*, 324-325 n.9. "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Id.*

[11]The state introduced approximately forty exhibits, and the defense introduced six exhibits. The petitioner's claim on appeal, and in this Court, has focused on one particular exhibit (the leather jacket) since that item best illustrates the harmfulness of the court's instruction. The remaining five defense exhibits were photographs of the scene of the incident.

test less stringent than the federally-mandated one.[12] Certiorari is therefore warranted because the Appellate Court "has decided a federal question in a way in conflict with applicable decisions of this Court." U.S. S.Ct.R. 17.1(c).[13]

II. WHETHER THE APPELLATE COURT CONSTRUED A CONNECTICUT SEXUAL ASSAULT STATUTE IN AN UNFORESEEABLE MANNER, AND RETROACTIVELY APPLIED THAT CONSTRUCTION TO PETITIONER'S CONDUCT, THEREBY VIOLATING THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW?

The second question presented in this petition rests on the principles enunciated in *Bouie v. City of Columbia*, 378

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[12]In its discussion of whether the instruction *was erroneous*, the Appellate Court cited five federal cases. *State v. Warren, supra*, 701, at App. p. 14A. All of those cases dealt with the admissibility of co-conspirators' statements. Since such statements are offered by the prosecution against the defendant, giving the jury a "second bite" at admissibility generally inures to a defendant's benefit. The same cannot be said of an instruction authorizing jurors to disregard a defendant's exhibits.

[13]In the courts below, petitioner did not argue that the erroneous instruction violated "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California, supra*, 23. At first blush, such a claim might seem untenable in light of *Rose v. Clark, supra* (instruction that impermissibly shifted the burden of proof on malice was subject to harmless error analysis). Yet, the *effect* of the erroneous instruction in this case was to skew the adjudicative process, by authorizing the jurors *not* to consider part of the defense case. Although all trial errors may "theoretically impair the defendant's interest in having a jury decide his case"; *Id.* 582 n.11; the impairment here was hardly "theoretical." Indeed, it prompts the question whether the trial "*reliably* served its function as a vehicle for determination of guilt or innocence. . . ." *Id.* 577-78. (Emphasis added.)

Should this Court grant the writ of certiorari on the first question presented, petitioner requests this Court to consider the claim discussed herein as a "subsidiary question fairly included" within the first question. U.S. Sup. Ct. R. 21.1(a). See *United States v. Mendenhall*, 446 U.S. 544, 551 n.5, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Youakin v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976).

U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). In *Bouie*, this Court held that "a deprivation of the right of fair warning [which is itself an essential ingredient of due process] can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. Petitioner contends that such an "unforeseeable and retroactive judicial expansion" occurred when the Connecticut Appellate Court construed Gen. Stat. Section 53a-70 to permit petitioner's conviction even if he did not personally engage in sexual intercourse with the victim.

In determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive a petitioner of the fair warning to which the Constitution entitles him, the relevant inquiry focuses on "state decisional consistency," that is, " 'the status of state law as of a given moment in the past — or, more exactly, the appearance to the individual of the status of state law as of that moment . . . ' ". *Bouie, supra*, at 354 (quoting from Amsterdam, Note, 109 U. Pa. L. Rev. 67, 74, n.34). As will be discussed below, the status of state law at the time of petitioner's conduct did not provide the requisite "fair warning."

In rejecting the petitioner's claim on appeal, the Appellate Court relied on both the language and legislative history of Conn. Gen. Stat. Section 53a-70. With regard to the statutory language, the Court pointed out that Section 53a-70 does not contain the language found in former Section 53a-72 (rape in the first degree) to the effect that "a male is guilty of rape in the first degree when he engages in sexual intercourse with a female (:) By forcible compulsion . . . ."[14] *State v. Warren, supra*, 693 (quoting same). The Court correctly noted that " '[t]he difference between the language used in the former

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[14]Conn. Gen. Stat. Section 53a-72 (rape in the first degree) was repealed in 1975, "and its provisions divided between sexual assault in the first degree, General Statutes Section 53a-70, and sexual assault in the second degree, General Statutes Section 53a-71." *State v. Warren, supra*, 693.

and the present statutes evinces a legislative intent to overcome the construction given the earlier statute by previous cases in this jurisdiction.' " *Id.* 694 (quoting *State v. Mackor,* 11 Conn. App. 316, 322, 527 A.2d 710 (1987)). But, as petitioner asserted below, *State v. Mackor* clearly shows that the "construction" of Section 53a-72 to be "overcome" dealt with the question of earnest resistance and nonconsent; *Id.* 322–23; *not* with the question of the liability of persons who do not engage in a sexual act.

The Appellate Court's reliance on the legislative history of Section 53a-70 was equally misplaced. The Appellate Court had itself previously noted that the "limited legislative history which is available" shows that the 1975 "statutory changes *were passed to delete earnest resistance and nonconsent* as elements of the crime. . . ." (Emphasis added.) *State v. Mackor, supra,* 323. As petitioner pointed out, there is *nothing* in the legislative history which proves, or even suggests, that the legislature ever *considered,* let alone "*intended* to extend liability under the sexual assault statute to those who compelled another to engage in sexual intercourse but did not engage in intercourse themselves." (Emphasis added.) *State v. Warren, supra,* 694. "In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of [Section 53a-70]. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955)." *Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971).[15]

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[15]By having "read into the statute" a drastic change which the legislature did not intend, and apparently did not even consider, the Appellate Court's decision will "lead to absurd consequences and bizarre results." *State v. Rodgers,* 198 Conn. 53, 61, 502 A.2d 360 (1985). For example, a woman who forcibly restrains a female victim, while a male companion engages in intercourse with that victim, will now be guilty of sexual assault in the first degree as a principal, rather than as an accessory. Moreover, proof that "such person engages in sexual intercourse with another person," is a prerequisite for conviction of sexual assault in the second degree (Section 53a-71, carrying a maximum penalty of ten years' imprisonment); but, since *Warren,* such proof is not a prerequisite for conviction of the more serious sexual assault in the first degree (up to twenty years' imprisonment).

In presenting this question, petitioner fully recognizes that, based on the evidence at trial, the jury *might* have been instructed that they could find petitioner guilty on a theory of accessorial liability.[16] But no such instruction was given. *State v. Warren, supra,* 692 n.1. Consequently, petitioner was fully justified in believing that the state would have to prove that *he* personally engaged in sexual intercourse with the victim, in order for the state to secure his conviction as a principal perpetrator of the crime charged.

In *Bouie v. City of Columbia, supra,* this Court reversed the petitioners' convictions for criminal trespass. In *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), this Court reversed obscenity convictions on the strength of *Bouie.* And in *Rabe v. Washington,* 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972), although not citing *Bouie,* this Court reversed a state obscenity conviction "because it rested on an unforeseeable judicial construction of the statute." *Marks v. United States, supra,* at 192. See also *Douglas v. Buder,* 412 U.S. 430, 432, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973). While the construction placed upon Section 53a-70 in *State v. Warren* "is of course valid for the future"; *Bouie, supra,* at 362; that construction was ". . . 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.' " *Id.* 354. Thus, no less than the petitioners in *Bouie, Marks,* or *Rabe,* the petitioner in this case has suffered a substantial deprivation of his right to due process of law as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution.

Since the Connecticut Appellate Court's decision in *State v. Warren* is in direct and unavoidable conflict with this Court's due process pronouncements, review on certiorari is warranted. U.S. Sup. Ct. R. 17.1(c).

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[16]Under Connecticut law, an instruction on aiding and abetting, Conn. Gen. Stat. Section 53a-8, requires that a jury be informed of the dual intents needed for conviction as an accessory. See *State v. Warren, supra,* 692 n.1.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgments and opinion of the Appellate Court of Connecticut.

Respectfully Submitted,

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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

MARTIN WARREN,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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STATE OF CONNECTICUT v. MARTIN WARREN
(4450)

DALY, BIELUCH and NORCOTT, Js.

Convicted of the crimes of sexual assault in the first degree and conspiracy to commit sexual assault in the first degree, the defendant appealed to this court. *Held:*

1. The defendant's claim to the contrary notwithstanding, the trial court did not err in instructing the jury that the defendant could be convicted of sexual assault in the first degree as a principal even if he, himself, did not have sexual intercourse with the victim.
2. The trial court did not abuse its discretion in ruling that certain evidence proffered by the defendant was irrelevant and had no bearing on the victim's credibility.
3. The trial court's instruction allowing the jury to make an independent determination as to the admissibility of certain exhibits was clearly erroneous but, under the circumstances here, that error was harmless beyond a reasonable doubt.
4. Because the principal disputed issue at trial was identity, which is not classically dependent upon circumstantial evidence for its proof, it was not reasonably possible that the jury was misled by an erroneous instruction regarding the use of circumstantial evidence.
5. The evidence presented, construed in a light most favorable to sustaining the jury's verdict, was sufficient to support the defendant's conviction on both counts.

Argued November 18, 1987—decision released June 14, 1987

Information charging the defendant with the crimes of sexual assault in the first degree and conspiracy to commit sexual assault in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Kremski, J.;* verdict and judgment of guilty, from which the defendant appealed to this court. *No error.*

Richard Emanuel, with whom, on the brief, was *Burton M. Weinstein,* for the appellant (defendant).

Daniel C. Casagrande, special assistant state's attorney, with whom was *Bradford J. Ward,* assistant state's attorney, for the appellee (state).

NORCOTT, J. The defendant appeals from the judgment of conviction, rendered after a jury trial, of the crimes of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) and conspiracy to commit sexual assault in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-70 (a). The defendant claims (1) that the trial court erred in instructing the jury on the elements of the crime of sexual assault in the first degree, (2) that the rape victims shield law, General Statutes § 54-86f, is unconstitutional because it violates the separation of powers provision of the Connecticut constitution, (3) that the rape victims shield law is unconstitutional as applied to this case, (4) that the trial court erred in limiting his cross-examination of the complainant regarding a prior rape complaint, (5) that the trial court erred in denying the defendant's motion to admit evidence of the complainant's prior sexual conduct, (6) that the trial court erred in instructing the jury on evidentiary exhibits, (7) that the trial court erred in its instructions on circumstantial evidence, and (8) that the evidence was insufficient to establish his guilt beyond a reasonable doubt of the crimes charged. We find no reversible error.

The jury could reasonably have found the following facts. On June 1, 1984, the complainant left her home at approximately 10:30 p.m. and went to Gig's, a nightclub and bar in Torrington. The complainant left Gig's at 1 a.m. on June 2, 1984. Sometime between the hours of 1 and 1:30 a.m., the complainant arrived at a bar in Waterbury called Toad's Place where she sat alone and had one or two beers. While at Toad's Place, the complainant was approached by a man she had met approximately one year earlier at a company outing. After a brief conversation, the complainant accompanied the man and one of his friends to a place in Naugatuck known as the Naugatuck Social Club.

The three arrived at the Naugatuck Social Club (NSC), a boarded-up, two room clubhouse where members and their guests shot pool and drank beer, at approximately 3 a.m. When the complainant walked in, she noticed that there were approximately twenty-five people in the clubhouse and that all but one or two were men. The defendant, who was then and had been the president or chairman of the NSC since its inception in 1983, was present when the complainant entered the clubhouse.

The complainant walked into the front room of the NSC. When she did, the men crowded around her. One of the men handed her a beer. She took a sip and the beer was taken away from her. Some of the men then began grabbing the complainant and pinching her. The complainant climbed up on top of the bar and tried to push the men away. The men continued to grab her, and she began clawing anyone who tried to touch her.

The complainant grabbed her pocketbook and tried to leave, but a man the complainant later identified as the defendant blocked the door. While the other men crowded around her, the defendant said, "I'll be the doorman." The defendant then said he wanted to play pool. He kicked the complainant and threw her onto the pool table. The complainant rolled off the table and someone handed her a pool stick. The defendant then proceeded to take a shot on the pool table. After the complainant had taken a shot, someone took the pool stick away from her. Some of the men grabbed the complainant and carried her to the back room, threw her down on a couch and proceeded to gang rape her. One of the men who participated in the gang rape was the defendant.

I

The defendant's first claim is that the trial court erred in instructing the jury on the elements of the crime of

sexual assault in the first degree. Specifically, the defendant takes issue with the court's statement that the "first element of [the crime of sexual assault in the first degree] . . . requires proof . . . that there was sexual intercourse with the complainant's body. . . . If you find that such intercourse took place, *whether by the defendant or someone else,* then the requirement of the first element is met." (Emphasis added.) It is the defendant's contention that this instruction enlarged the crime of sexual assault beyond the terms of the statute, thereby depriving him of his right to notice of the charges against him and his right to due process law. We find no error.

At the outset, we note that the defendant did not properly preserve this issue for appeal. The defendant neither filed a specific request to charge on this issue nor did he take an exception to the charge given. Practice Book § 854. Despite the defendant's failure to preserve this claim properly, we will review it for the first time on appeal because it implicates the defendant's fundamental constitutional right to a fair trial. *State* v. *Brown,* 199 Conn. 14, 26, 505 A.2d 690 (1986); *State* v. *Evans,* 165 Conn. 61, 70, 327 A.2d 576 (1973).

The due process clause of the fourteenth amendment to the United States constitution requires that every fact necessary to constitute the crime of which the accused stands charged must be proven beyond a reasonable doubt before the accused may be convicted. *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In order to ensure that every fact is proven beyond a reasonable doubt, "[i]t is . . . constitutionally axiomatic that the jury be instructed on the essential elements of a crime charged." *State* v. *Williamson,* 206 Conn. 685, 708, 539 A.2d 561 (1988). " ' " ' "If justice is to be done . . . it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly

with respect to the essential elements of the alleged crime." *United States* v. *Clark*, 475 F.2d 240, 248 (2d Cir. [1973])'. . . . " *State* v. *Kurvin*, [186 Conn. 555, 561, 442 A.2d 1327 (1982)].' *State* v. *Roque*, 190 Conn. 143, 157, 460 A.2d 26 (1983); *State* v. *Griffin*, 175 Conn. 155, 163, 397 A.2d 89 (1978)." *State* v. *Williamson*, supra, 709.

In this case, the defendant claims that the court's instruction was inaccurate in that it allowed him to be convicted of sexual assault in the first degree as a principal even if he, himself, did not have sexual intercourse with the complainant.[1] Our Supreme Court has recognized that "an instruction containing a misstatement of the law is more likely to be prejudicial than an instruction that contains an omission or an incomplete statement of the law. *Henderson* v. *Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977)." *State* v. *Preyer*, 198 Conn. 190, 198, 502 A.2d 858 (1985). We find, however, that the court's instruction is not a misstatement of the law.

General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person . . . ." It is axiomatic that the words in a statute are to be given their plain and ordinary meaning. *Carlson* v. *Kozlowski*, 172 Conn. 263, 266, 374 A.2d 207 (1977). By its very terms,

[1] The state contends that the trial court properly instructed the jury on the elements of accessorial liability. We disagree. In order to be considered adequate, an instruction on accessorial liability must inform the jury that the defendant can be found guilty only if (1) he intended to commit the underlying felony of sexual assault in the first degree, and (2) he intended to aid the principal. *State* v. *Fleming*, 198 Conn. 255, 271, 502 A.2d 886 (1986), cert. denied, 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342; General Statutes § 53a-8. The trial court's mere statement that the defendant could be convicted even if he did not engage in intercourse did not properly instruct the jury on these elements of the crime.

this statute imposes liability for sexual assault on any person who compels another person, by the use of force, to engage in sexual intercourse, regardless of with whom the sexual act is performed. That the statute is to be given this construction is clear from its legislative history. "In construing a statute, [the] court will consider its plain language, its legislative history, its purpose and the circumstances surrounding its enactment." *State* v. *Parmalee,* 197 Conn. 158, 161, 496 A.2d 186 (1985).

Prior to 1975, the act of forcibly compelling someone to engage in sexual intercourse was considered rape in the first degree as proscribed by General Statutes (Rev. to 1975) § 53a-72. *State* v. *Rodgers,* 198 Conn. 53, 60–61, 502 A.2d 360 (1985). General Statutes (Rev. to 1975) § 53a-72 provided: "A male is guilty of rape in the first degree when *he* engages in sexual intercourse with a female: (1) By forcible compulsion . . . ." (Emphasis added.) It is clear under the terms of that statute that, in order to be guilty of rape in the first degree, a male had to personally engage in sexual intercourse with a female victim.

In 1975, however, General Statutes § 53a-72 was repealed and its provisions divided between sexual assault in the first degree, General Statutes § 53a-70, and sexual assault in the second degree, General Statutes § 53a-71. *State* v. *Rodgers,* supra, 60–61. In enacting this change, the legislature eliminated the requirement that the defendant must engage in a sexual act with the victim. " '[W]e may not presume that the legislature has enacted futile or meaningless legislation or that a change in the law was made without a reason.' *City Council* v. *Hall,* 180 Conn. 243, 251, 429 A.2d 481 (1980). 'We can assume that this change in the law was made to accomplish some purpose.' *Brown* v. *Cato,* 147 Conn. 418, 162 A.2d 175 (1960)." *State* v. *Mackor,* 11 Conn. App. 316, 322, 527 A.2d 710 (1987).

"The difference between the language used in the former and the present statutes evinces a legislative intent to overcome the construction given the earlier statute by previous cases in this jurisdiction." Id. The elimination of the requirement that the defendant personally engage in sexual intercourse with the victim shows unmistakably that the legislature intended to extend liability under the sexual assault statute to those who compelled another to engage in sexual intercourse but did not engage in intercourse themselves.[2] Because we hold that a person may be convicted of the crime of sexual assault in the first degree as a principal even if he, himself, does not engage in intercourse, we find that neither the defendant's due process rights nor his right to be apprised of the crimes with which he was charged were infringed.

II

The defendant's next four claims of error relate to the trial court's refusal to permit the introduction of (1) certain evidence regarding a prior sexual assault claim made by the complainant, and (2) evidence that the complainant had, on prior occasions, simulated oral sex with a beer bottle. The defendant claims that the evidence proffered was relevant and admissible and that the trial court's refusal to allow its admittance denied him his constitutional right to confront witnesses, his right to present a defense, and his right to due process of law. U.S. Const., amends. VI and XIV; Conn. Const., art. I, § 8. The defendant further contends that the rape victims shield law, General Stat-

[2] The case of *State* v. *Gianotti*, 7 Conn. App. 701, 510 A.2d 451, cert. denied, 201 Conn. 804, 513 A.2d 700 (1986), is not to the contrary. In *Gianotti*, we were concerned merely with whether the court's instruction was adequate as a charge on aiding and abetting. We were not presented with the question of whether one may be convicted as a principal of sexual assault in the first degree even if one didn't personally engage in the act of sexual intercourse.

utes § 54-86f, is violative of the separation of powers provision of the state constitution. Conn. Const., art. II; see also Conn. Const., art. V, § 1.

The following facts are pertinent to these claims of error. On direct examination, the complainant testified that after she had been thrown down on the couch, the defendant came and sat on her chest. As the defendant sat on her chest, other men began inserting things into her vagina. The complainant testified that she believed that one of the objects inserted into her vagina was a beer bottle.

On cross-examination, the complainant was asked how she could identify the object that was inserted into her vagina. The complainant testified that it "just felt like a beer bottle." The complainant was then asked if she had ever had an experience like that before. She replied that she had not. On cross-examination, defense counsel also sought to inquire of the complainant whether she had ever before claimed to have been sexually assaulted. The state objected and the court sustained the objection.

At the close of the state's case, the trial court reconsidered its earlier ruling and allowed the defendant to cross-examine the complainant about the prior claim of sexual assault. In making this ruling, however, the trial court limited the cross-examination to questions relevant to credibility and indicated that it would not permit any detailed examination into the collateral facts involved in that line of questioning.

On cross-examination, the complainant testified that approximately two years earlier, she had told several people that she had been raped. She further testified that she could not identify her attacker because she had been unconscious at the time and had only found out about the incident because someone had told her about it. Defense counsel then inquired as to who told the

complainant she had been raped. The state objected and the objection was sustained. Defense counsel also sought to inquire as to why the complainant was unconscious, but an objection to that line of questioning was sustained.

The defense then proceeded to put on its case. After the presentation of four witnesses, but before resting, the defendant made a motion to introduce evidence regarding (1) the complainant's simulated oral sex with a beer bottle, and (2) the complainant's prior rape complaint. The defendant claimed that this evidence was relevant to the issue of the complainant's credibility. The court denied the defendant's motion.

With regard to the proffered evidence regarding the complainant's simulated oral sex on a beer bottle, the trial court found that the evidence was too remote to bear on the complainant's credibility. The trial court's finding that the evidence was too remote was clearly a finding that the evidence was irrelevant. *State* v. *Hoeplinger*, 9 Conn. App. 147, 155, 517 A.2d 632 (1986), rev'd on other grounds, 206 Conn. 278, 537 A.2d 1010 (1988). "The rules governing the determination of relevancy are well established. '[E]vidence is relevant only when it tends to establish the existence of a material fact or to corroborate other direct evidence in the case.' *State* v. *Talton*, 197 Conn. 280, 285, 497 A.2d 35 (1985); *State* v. *Sharpe*, 195 Conn. 651, 659, 491 A.2d 345 (1985)." *State* v. *Franko*, 199 Conn. 481, 485–86, 508 A.2d 22 (1986). A trial court has broad discretion to determine the relevancy of proffered evidence. *State* v. *Schaffer*, 168 Conn. 309, 317, 362 A.2d 893 (1975).

In this case, the trial court clearly did not abuse its discretion in holding that the proffered evidence was irrelevant. The fact that the complainant may have, at one time, had a beer bottle in her mouth does not tend to show that she has ever had a beer bottle in her

vagina, nor does it tend to show that the complainant was untruthful when she said that she had never had an experience like that before. We find that this evidence was properly excluded from the jury's consideration.

With regard to the evidence concerning the complainant's prior rape complaint, the defendant first contends that the trial court impermissibly restricted his cross-examination of the complainant.

The defendant's right to cross-examine the witnesses against him is guaranteed by the sixth amendment to the United States constitution and by article first, § 8, of the Connecticut constitution. "The right of the defendant to confront and cross-examine the witnesses against him [however] is not absolute; *Chambers* v. *Mississippi*, [410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)]; *State* v. *Franko*, supra, 488; 'but may bow to "other legitimate interests in the criminal trial process." *Chambers* v. *Mississippi*, supra, 295; *State* v. *Vitale*, 197 Conn. 396, 401, 497 A.2d 956 (1985); *State* v. *Mastropetre*, 175 Conn. 512, 521, 400 A.2d 276 (1978).' . . . *State* v. *Franko*, supra, 488." *State* v. *Daniels*, 8 Conn. App. 190, 193, 512 A.2d 936 (1986). "The general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial court, but this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment." *State* v. *Cox*, 7 Conn. App. 377, 384, 509 A.2d 36 (1986). A trial court may limit the cross-examination of a witness so as to prohibit the intrusion into collateral matters. *State* v. *Gaynor*, 182 Conn. 501, 509, 438 A.2d 749 (1980); *State* v. *Cox*, supra, 384.

While it would have been a denial of the defendant's right of confrontation to refuse any cross-examination on the prior rape complaint; see *State* v. *Ouellette*, 190

Conn. 84, 102–103, 459 A.2d 1005 (1983); the trial court did not so limit the cross-examination of the complainant in this case. Defense counsel was given an opportunity to cross-examine the complainant about her prior complaint and, in the process, was permitted to develop facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the complainant, thus satisfying the constitutional standard. *State* v. *Gaynor*, supra; *State* v. *Cox*, supra; see also *State* v. *Heinz*, 3 Conn. App. 80, 86, 485 A.2d 1321 (1984). "Once it is established that the trial court's ruling on the scope of cross-examination is not constitutionally defective, this court will apply '[e]very reasonable presumption . . . in favor of the correctness of the trial court's ruling in determining whether there has been an abuse of discretion.' *State* v. *Briggs*, 179 Conn. 328, 333, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980)." *State* v. *Castro*, 196 Conn. 421, 426, 493 A.2d 223 (1985). " ' "To establish an abuse of discretion, [the defendant] must show that the restrictions imposed upon [the] cross-examination were clearly prejudicial." *United States* v. *Elliott*, 571 F.2d 880, 909 (5th Cir. 1978); *Gordon* v. *United States*, 438 F.2d 858, 865 (5th Cir. 1971).' *State* v. *Gaynor*, supra, 510." *State* v. *Castro*, supra, 426.

In this case, we cannot say that the trial court abused its discretion in limiting the scope of the complainant's cross-examination. As we noted above, the trial court allowed the defendant to cross-examine the complainant about this matter so as to put the issue of her reliability before the jury. The two additional questions the defendant sought to ask were clearly collateral, and the defendant has failed to demonstrate that he was prejudiced by their exclusion.

The defendant also claims that he should have been allowed to produce extensive evidence that the com-

plainant was not unconscious at the time the prior rape had occurred. In proffering this evidence, the defendant was attempting to impeach the complainant by contradictory testimony.

"The testimony of any witness may be contradicted by the testimony of any other witness." C. Tait & J. LaPlante, Connecticut Evidence (2d Ed.) § 7.24.1. Extrinsic evidence, however, is not admissible to impeach the credibility of a witness on a collateral issue. *State* v. *Carbone,* 172 Conn. 242, 262, 374 A.2d 215, cert. denied, 431 U.S. 967, 97 S. Ct. 2925, 53 L. Ed. 2d 1063 (1977); *State* v. *Rogers,* 9 Conn. App. 208, 212, 518 A.2d 399 (1986), cert. denied, 202 Conn. 806, 520 A.2d 1288 (1987). In this case, the trial court was correct in ruling that the proffered evidence was inadmissible to impeach the complainant's credibility. The proffered evidence was clearly collateral to the present case. See *State* v. *Rogers,* supra.

Because we have found that the evidence proffered by the defendant was properly excluded as irrelevant and collateral, we need not address the defendant's challenge to the constitutionality of the rape victim's shield law. " 'We have held on numerous occasions that the court will not pass upon a constitutional question if there is present some other ground upon which the case may be decided.' *Hartford* v. *Powers,* 183 Conn. 76, 84–85, 438 A.2d 824 (1981) and cases cited therein, including *State* v. *Gold,* 180 Conn. 619, 639–40, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980)." *State* v. *Williams,* 200 Conn. 310, 322, 511 A.2d 1000 (1986); see also *State* v. *Franko,* supra, 485.

III

The defendant next claims that the trial court erred in its instructions to the jury on the use of evidentiary

exhibits. The defendant concedes that no exception was taken to this charge at the trial level but asserts that this claim is reviewable under the doctrine of *State* v. *Evans*, supra. We find that this claim implicates the defendant's fundamental constitutional right to a fair trial, and hence, we will review this claim for the first time on appeal. Id.

It is axiomatic that "it is the trial court judge, and not the jury, who determines the admissibility of evidence." *State* v. *Randolph*, 190 Conn. 576, 587, 462 A.2d 1011 (1983); see also Fed. R. Evid. Rule 104 (a) ("[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court"). This rule is based on the long established principle that it is the province of the trial court to determine questions of law while it is the province of the jury to determine only questions of fact. *State* v. *Tomassi*, 137 Conn. 113, 123, 75 A.2d 67 (1950). By removing the question of the admissibility of evidence from the jury, this rule ensures that the jury will only consider that evidence that is properly before it and also, that the jury will not disregard evidence it is bound to consider.

In this case, it is clear that the trial court made an initial determination of the admissibility of all the exhibits entered at trial. After the presentation of all of the evidence, however, the trial court instructed the jury that "You must decide, under the same test of reasonable probability, whether the identification nature of the item is sufficient to warrant its reception in evidence." The defendant claims that this instruction was error because it required the jury to make an independent determination as to the admissibility of the physical evidence.

Several courts have had the opportunity to consider charges, such as the one given in this case, which allow the jury to determine the admissibility of evidence even after the court had deemed it to be admissible. In *United States* v. *Dennis*, 183 F.2d 201, 230–32 (2d Cir. 1950), aff'd, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), Judge Hand reviewed such a charge dealing with the admissibility of a coconspirator's statement. Judge Hand noted that "the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for laymen, and for that matter most judges, to keep their minds in the isolated compartments that this requires." Id., 231. Almost all of the courts who have recently addressed this issue have reached the same conclusion. See, e.g., *United States* v. *Federico*, 658 F.2d 1337, 1342 (9th Cir. 1981); *United States* v. *Jackson*, 627 F.2d 1198, 1217–18 (D.C. Cir. 1980); *United States* v. *Bey*, 437 F.2d 188, 190–92 (3d Cir. 1971). We agree with the rationale expressed in those decisions. " 'When the judge decides admissibility, the jurors should not be told anything about the issue. Giving them a "second bite at the apple" serves only to confuse, and achieves no useful purpose . . . . ' " *United States* v. *Mastropieri*, 685 F.2d 776, 789 (2d Cir.) cert. denied sub nom. *Pate* v. *United States*, 459 U.S. 945, 103 S. Ct. 260, 74 L. Ed. 2d 203 (1982), quoting 1 Weinstein, Evidence § 104.[05] at 104-44.9.

Under this standard, the trial court's instruction was clearly erroneous. We must now determine, however, whether the court's instruction was harmless beyond

a reasonable doubt. *State* v. *Coleman*, 14 Conn. App. 657, 678–83, A.2d (1988). We find that it was.

The defendant contends that the error was not harmless because it allowed the jury to refuse to consider a jacket that had been entered into evidence which the defendant purported to have worn on the night of the incident at the NSC. The thrust of the defense in this case was that the defendant was present at the NSC when the complainant was assaulted but that the complainant misidentified him as the man who led the assault. The complainant had testified that the man who led the attack was wearing a specific type of jacket, and the defendant produced evidence that he was wearing another type of jacket. The defendant entered into evidence the jacket he claims to have been wearing that night.

We begin by noting that there were no questions raised at trial concerning the authenticity of the jacket the defendant entered into evidence. No objection was made to its admission into evidence. It is hard to believe that when no objection was made to its admission, the jury could conclude that the "identification nature of the item [was not sufficient] to warrant its reception into evidence." We further note that the question in this case was not whether the jacket the defendant claimed to have worn existed. The question was whether he was wearing that jacket on the night in question, and whether the complainant misidentified him. The defendant had several witnesses who testified as to what he was wearing on the night in question, and the jury was bound to consider that evidence. Given these facts and the fact that the instruction worked to the defendant's benefit for the exhibits entered by the state, we find this instructional error to be harmless beyond a reasonable doubt.

IV

The defendant next claims that the court erred in its instructions to the jury on circumstantial evidence.[3] The defendant claims that the court's instructions unconstitutionally diluted the state's burden of proving guilt beyond a reasonable doubt.

In the past, our courts have found no error in the giving of an instruction which requires that all inferences drawn must be reasonable. *State* v. *Silano*, 204 Conn. 769, 772–75, 529 A.2d 1283 (1987); *State* v. *Wright*, 9 Conn. App. 275, 280–83, 518 A.2d 658 (1986), cert. denied, 203 Conn. 802, 522 A.2d 293 (1987). This charge compares favorably with those earlier instructions. Even if we were to find error in this case, we note that the primary disputed issue at trial was the identity of the defendant. We have often held that where the principal disputed factual issue at trial is identity, which is not classically dependent upon circumstantial evidence for its proof, the trial court's instructions may be read as a whole to determine whether it is reasonably possible that the jury was misled by an erroneous instruction regarding the use of circumstantial evidence. *State* v. *Peay*, 13 Conn. App. 578, 582, 538 A.2d 708 (1988); *State* v. *Biggs*, 13 Conn. App. 12, 21, 534 A.2d 1217 (1987); *State* v. *Perez*, 10 Conn. App. 279,

[3] The court instructed the jury as follows: "What a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was and that testimony you can believe or not, according to whether or not it warrants belief. But, no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which you, the jury, can determine what a person's purpose or intention was in any given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct and from those you may infer what his purpose or intention was. This is not a mandatory inference, but it is one which you may draw, if you find it is reasonable to do so."

283–84, 523 A.2d 508, cert. denied, 203 Conn. 810, 525 A.2d 524 (1987). Reading the instructions as a whole, we find that it is not reasonably possible that the jury was misled. *State* v. *Biggs*, supra, 22–23.

V

The defendant's final claim is that the evidence was insufficient to support either his conviction for sexual assault in the first degree or his conviction for conspiracy to commit sexual assault in the second degree. "The standard that applies when a jury verdict is challenged for insufficiency of the evidence is well settled. The issue is whether the jury could reasonably have concluded, upon the facts established and inferences reasonably drawn therefrom, that the defendant was guilty beyond a reasonable doubt. *State* v. *Baskins*, 12 Conn. App. 313, 316, 530 A.2d 663 (1987). 'The evidence must be given a construction most favorable to sustaining the jury's verdict.' *State* v. *Carter*, 196 Conn. 36, 44, 490 A.2d 1000 (1985); see *State* v. *Monk*, 198 Conn. 430, 432, 503 A.2d 591 (1986). Every element of the crime charged must be proved, and although it is in the province of the jury to draw logical inferences from the facts proven, they may not resort to speculation." *State* v. *Robinson*, 14 Conn. App. 40, 42, 539 A.2d 606 (1988).

Construing the evidence in a light most favorable to sustaining the jury's verdict, we find the evidence sufficient to support the defendant's conviction on both counts.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT
APPELLATE COURT

A.C.4450

STATE OF CONN.

V. :

MARTIN WARREN July 13, 1988

ORDER

THE MOTION OF THE DEFENDANT APPELLANT, FILED JUNE 24, 1988, FOR REARGUMENT OR RECONSIDERATION OF THE APPEAL, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED denied.

BY THE COURT,

/s/ Michele L. Angers
ASSISTANT CLERK — APPELLATE

NOTICE SENT: 7-14-88
DANIEL CASAGRANDE, DEPUTY ASSISTANT
STATE'S ATTORNEY
JOHN A. CONNELLY, STATE'S ATTORNEY
WEINSTEIN, WEINER & SHAPIRO
RICHARD EMANUEL
HON. JULIUS J. KREMSKI
WATERBURY, (CR4 110543)
REPORTER OF JUDICIAL DECISIONS

pb

SUPREME COURT
STATE OF CONNECTICUT

NO. PXC-88-1019

State of Connecticut

v.

Martin Warren

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (14 Conn. App. 688) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/ Cynthia M. Gworek
Assistant Clerk — Appellate

Dated: September 20, 1988

Notice to: 9/21/88
Clerk, Superior Court, Waterbury-CR-4-110543
Clerk, Appellate Court
Richard Emanuel
Weinstein, Weiner & Shapiro
John A. Connelly, S.A.
John O'Meara, D.A.S.A.
Secor, Cassidy & McPartland

Richard Emanuel and *Burton M. Weinstein* in support of petition — *John O'Meara, Deputy Assistant State's Attorney* in opposition.